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Ecofeminism and gender migrations in today's international law. Challenges for the near future

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Abstract: This paper aims to investigate the ecofeminist method in international law where migration is the result of climate change or of other types of deteriorating phenomena such as the environment and what we call slow violence. The notions of climate violence and gender migration start from the analysis of the problem which proposes to some bodies at an international level an explanation for the ecofeminism method as well as of providing theoretical and more sophisticated positions. The protection par ricochet to migration cases from climate change as well as the Teitiota case and the analysis proposed by the Human Rights Committee of the UN of 24 October 2019 clearly show that women are certainly vulnerable and that they need help in order to be faced not only as women but also as individuals who deserve greater protection from men.

Keywords: Climate change; slow violence; gender migration; Teitiota case; protection par ricochet; international protection; Human Rights Committee of the UN; international disasters; slow violence.

Introduction

Climate change is a scientific notion that is addressed by various sciences. In recent years a relationship with immigration and international law has also been noted. Climate change can be compared as a reason for inequality towards women and as a type of injustice (Albertyn, Alviar García, Campbell, Fredman, Rodriguez De Assis Machado, 2023). The term discrimination contains genders that presented in societies as a social phenomenon since contribute to a form of violence especially towards women who are forced to leave their country and move to other one(s) (Mcadam, 2011; Mcadam, 2012; Kälin, Schrepfer, 2012; Scott; Carroll, 2020; Fornalè, 2020; Atapattu, 2020; OHCHR, 2021; Behrman, Kent, 2022). As early as 2016, the New York Declaration for Refugees and Migrants recognized that migration was a response to climate change, natural disasters and

environmental factors at a global level¹.

The ecofeminist method² in international law as well as migration are the consequence of a general deterioration of the environment. Certainly within this context the recognition of gender in migration due to climate change has been affirmed by many international bodies³ given the impact of large and devastating disasters in the progressive deterioration of the environment as slow violence (Nixon, 2011). Migration of women and climate change are linked to the reduction of natural resources. The biological difference of women compared to men, as well as social, economic, political and any other barriers are obstacles to the daily life of women across the planet. Women are the main water providers who suffer the greatest effects of

¹New York Declaration for Refugees and Migrants, United Nations General Assembly resolution of 19 September 2016, A/71/L. 1.

²<https://blog.mdpi.com/2023/02/08/everything-ecofeminism/>

³IOM, A Gender Approach to Environmental Migration, Brief n. 13 in IOM Outlook on Migration, Environment and Climate Change, Geneva 2014: https://publications.iom.int/system/files/pdf/mecc_outlook.pdf; UNHCR, Gender, Displacement and Climate Change, Geneva, 2022: <https://reporting.unhcr.org/document/3568>; UN Women, Explainer: How gender inequality and climate change are interconnected, 2022: <https://www.unwomen.org/en/news-stories/explainer/2022/02/explainer-how-gender-inequality-and-climate-change-are-interconnected>

climate change and may be induced to migrate to another country and move within it. Such phenomena of migration of women are subordinate positions in societies thus becoming the main direct and indirect victims of natural disasters. The disproportionate impact of climate change and the lack of water is a phenomenon that places women in the category of vulnerable subjects and are able to grasp the complexity of intersectional forms of discrimination and the context in which they occur.

The contribution to climate violation and gender migration was a topic of analysis based on the UN Special Rapporteur on Violence against Women, its Causes and Consequences (UNSRVAW) report of 2022⁴. The objective was the deployment of the ecofeminism method used in international law which has been defined as “gender-sensitive protection par ricochet”, in cases of migration due to climate change and slow violence as noted in the teitiota case and decided by the UN Human Rights

⁴General Assembly of the UN, Special Rapporteur on violence against women and girls, its causes and consequences, Reem Alsalem, Violence against Women and Girls in the Context of the Climate Crisis, including Environmental Degradation and Related Disaster Risk Mitigation and Response, A/77/136, 11 July 2022.

Committee on 24 October 2019⁵, i.e. as paths of the migratory phenomenon.

Climate violence and gender migration

The word violence as a notion already includes in its core something negative at a national and international level as well as at a private level in interpersonal relationships. Hannah Arendt stated that:

“(...) violence is the most evident manifestation of power, a social construction and not a natural attribute of the human being: Neither violence nor power are natural phenomena, that is, manifestations of a vital process; they belong to the political sphere of human affairs, whose essentially human quality is guaranteed by the individual's faculty to act, by the ability to start something new (...)”.

Violence is therefore not “natural”, but an instrument of perpetuation of power relations that have taken root and are reproduced in society. The “structural” and systemic violence against women is the object of a form of “state” violence, whose civil rights are constantly trampled on for the sole fact of “being a woman”⁶. Violence also occurs when the state “tolerates” its

⁵United Nations Human Rights Committee, *Ioane Teitiota v. New Zealand*, communication no. 2728/2016, CCPR/C/127/D/2728/, 23 September 2020.

⁶Mahsa N. Women, Statement on women's rights in Iran, 27 September 2022: <https://www.unwomen.org/en/news-stories/statement/2022/09/un->

manifestations in private relationships, for example when the authorities do not respond immediately to the victims' complaints or when they do not carry out adequate risk assessment in action to prevent the escalation of violent behavior. Violence is also expressed through the domination of human beings over other species, repeating patterns present within species (Jones, 2023). It constitutes law as it provides “the occasion and the method for founding legal systems, giving (as a regulator of force and coercion) a reason to exist and identifying “the means through which law acts” (Kelsen, 1961; Bobbio, 1965; Sarat, Kearns, 1995; Benjamin, 1996; Hamzic, 2018)⁷.

So when we talk about violence in the state and interstate sense, the boundaries that define climate violence are delineated in a disproportionate way towards women. Climate violence captures climate change as a consequence of a set of situations that cause humanity to (Gaard, 1993) include human beings. The term

[women-statement-on-womens-rights-in-iran](https://news.un.org/en/story/2022/09/1128111); UN News, UN condemns violent crackdown against hijab protests, 27 September 2022, <https://news.un.org/en/story/2022/09/1128111>

⁷According to Sarat and Kearns: “(...) violence, as a fact and a metaphor, is integral to the constitution of modern law (...). Law is a creature of both literal violence, and of imaginings and threats of force, disorder, and pain (...)”.

climate violence includes the gender-based violence against women due to climate change. Climate change contributes forms of discrimination in society which materializes phenomena of violence. The roots of these phenomena are facilitated and respond uniquely to individual experiences. The climate is not the cause of migration but it is “socially mediated” (Lama, Hamza, Wester, 2021).

Climate violence thus goes beyond the notion of climate change and also includes slow violence on a legal level. Violence is thus conceived as an action that explodes at a certain moment in the history of a natural disaster. International law manages disasters and focuses on the legal issues that give rise to the prevention and response to the recovery of various catastrophic events of a natural nature. Disasters caused by humanity such as industrial and large-scale accidents (Lama, Hamza, Wester, 2021; Samuel, Aronsson-Storrier, Nakjavani Bookmiller, 2019; Bakošová, Scott, 2020; Zorzi Giustiniani, 2021). This type of violence captures a part of the situations that are produced by human activity and fails to identify the forms that are “neither spectacular nor instantaneous” but “incremental”. Slow violence

is an invisible form and its effects are produced on human beings in an intergenerational perspective. Examples include climate change, thawing, permafrost, acidification of the sea, especially of the oceans, deforestation, rising seas, the use of pesticides and the use of substances such as mercury⁸.

For example, in Kiribati, problems with seawater flooding have been noted. By polluting wells the access of women living in rural areas to water and firewood needed to prepare food and medicinal plants is limited⁹. Slow violence has a disastrous

⁸See the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, in the relevant Report of 2022: “(...) women and girls aged 14–45 years are particularly vulnerable to the neurotoxic impact of mercury. Particular risks involve the impact on unborn children. In utero exposure to mercury at very low levels can result in significant IQ deficits and developmental disorders. If mothers have highly elevated mercury levels, their children can be born with deformities, severe cognitive impairment, and symptoms reported in Minamata disease such as paraesthesia, ataxia, dysarthria, tremors, and constriction of visual fields, or “tunnel vision”. These symptoms can be progressive and sometimes fatal. Offspring of survivors of Minamata disease have intellectual disabilities, limb deformities, chorea, seizures and microcephaly”. Human Rights Committee, Mercury, small-scale gold mining and human rights, A/HRC/51/35, 8 July 2022.

⁹Committee for the elimination of discrimination against women(Committee EDAW), Concluding observations su Kiribati, 2020, CE- DAW/C/KIR/CO/1-3, par. 45 b.

environmental basis. Disasters that are noticed in the short, medium and long term as well as on the legal level, gradually producing the trap of the imminent present. Within this context we note international obligations, such as the Paris Agreement, debates related to climate change that are noted during the COVID-19 pandemic, overcoming the urgency of responding to a health emergency of global proportions while avoiding the relationship between destruction of environment and spread of pandemics (De Vido, 2021). Coal emissions do not represent an immediate disaster but have a disproportionate impact on women who are pregnant and linked to increasing mortality rates as seen in women giving birth in South Korea¹⁰. Slow violence from a legal point of view includes the terms of obligations deriving from international conventions where the Paris Agreement concerns climate change, the Montego Bay Convention which deals with marine pollution and the Stockholm Convention on persistent organic pollutants of 2001 as applicable principles of international environmental law in terms of violation of fundamental human rights (Cusato, 2021).

¹⁰CEDAW Committee, Concluding observations about South Korea, 2018, CEDAW/C/KOR/CO/8, par. 14.

The gender approach is absent in international migration law (Indra, 1987; Macklin, 1995; Crawley, 1998; Crawley, 2001; Pessar, Mahler, 2003; Van Walsum, Spijkerboer, 2007, Mullally, 2011; Firth, Mauthe, 2013; Oosterveld, 2014; Freedman, 2015; Spijkerbboer, 2016; Timmerman and others, 2018; Crawley, 2021). Even the UN Convention of 1951 relating to the status of refugees gave us a neutral notion for the refugee but nothing was mentioned for women in particular as a male form that is oriented from a legal point of view to persecution reflecting male experiences (Kelly, 1993). The convention thus formulates refugee status as a consequence of gender violence and as a form of persecution.

The absence of the gender dimension does not depend on the socio-political context and the negotiations are conducted and rooted in contrast between private/public where the state has no international legal obligations regarding the private dimension of violence (Romany, 1994; Sullivan, 1995). Women's rights and the recognition of gender discrimination emerged in the 1970s with the 1979 adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), General

Recommendation No. 19 of the Committee established by CEDAW (EDAW Committee), which stated:

“(...) violence against women within the scope of application of the UN legal instrument. Women were absent and invisible in the international arena, linked to the private dimension (...) women's activities could not obtain that “political” character that was traditionally conceived as typical of the male experience and, therefore, object of protection also on the basis to international law. The gender dimension has been recovered by international soft law instruments (...)”.

Continuing with the 2002 UNHCR guidelines (Gender Guidelines)¹¹ which indicated women as an example of “social subset defined by innate and immutable characteristics and who are frequently treated differently than men”¹².

Recommendation no. 38 of the EDAW Committee to the Report of the United Nations Special Rapporteur against gender violence

Climate change is a war that all humanity is fighting and does not

¹¹UNHCR, Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01 7 May 2002 (Gender Guidelines). Before 1991 UN-Refugee Women (July 1991):

<https://www.refworld.org/docid/3ae6b3310.html>;

<https://www.unhcr.org/publications/operations/3b9cc26c4/sexual-violence-against-refugees-guidelines-prevention-response-unhcr.html>

¹²UNHCR, Gender Guidelines, op. cit., par. 30.

distinguish the gender, age, ethnicity, geographical origin, social and economic condition of individuals. The surface captures the problematic nature of this statement. Climate change, like other forms of slow violence, is a human, social and environmental phenomenon. In particular, it is stated that it is:

“(...) a “(un)natural disaster”, which causes more marked effects where there are already situations of vulnerability which are exacerbated by climate change itself (...). Climate change it becomes a question of respect for human rights for everyone, but especially for those whose human rights are already compromised (Atrey, 2023). For the situation of people living in third world countries as well as for women. United Nations bodies have already expressed their views on the impact of climate change on women (...)”¹³.

From the General Recommendation no. 37 (2018) on the gender dimension of disaster risk reduction and climate change, the EDAW Committee stated that:

“(...) structural inequalities against women make them more exposed to disaster risks and loss of their means of subsistence¹⁴ (...) mortality and illness levels are higher among women in disaster situations, as a consequence of their already precarious living conditions (...) also as a result of response mechanisms to environmental emergencies that do not take taking into account

¹³UNCTAD, The Least Developed Countries Report 2022, https://unctad.org/system/files/official-document/ldc2022_en.pdf, p. 3 ss.

¹⁴Committee EDAW, General Recommendation n. 37 (GR 37) on Gender-Related Dimensions of Disaster Risk Reduction in a Changing Climate, 13 March 2018, CEDAW/C/GC/37, par. 3.

the specific needs of different groups of women (...). Gender violence against women, including sexual violence which is widespread in cases of humanitarian crisis, is exacerbated in situations of disaster and destruction of natural resources (...). The access to education, already limited for girls and boys as a result of social, cultural and economic barriers, becomes even more complex following disasters as a consequence of the destruction of infrastructure, lack of teachers, economic difficulties (...). The right to work and social protection, the situation of social inequality between women and men, the former often employed in precarious and informal jobs, is worsening. The burden of domestic and care work increases following disasters due to the destruction of food stocks, housing and infrastructure, including the supply of water and energy (...). Women's right to health is severely limited disproportionate as a consequence of disasters and climate change, again due to structural inequalities in society, with reference to access to food, health and care (...) access to health and reproductive health services, while not mentioning the fact that, for example, high levels of pollution from some substances, including mercury, have an impact on the reproductive rights of women (...). Especially if residing in rural areas, are also directly affected by climate change, which causes reduced food security, degradation of land and less access to water and other natural resources (...)”¹⁵.

It has been noted that the possession of land is not part of women's property. Women are often excluded from agricultural activity which is part of the male emigrating society. The women's movement is at risk. In many societies, women are

¹⁵EDAW Committee, General Recommendation n. 37 (GR 37), op. cit., par. 69.

prevented from emigrating due to discriminatory laws, gender stereotypes, and caring responsibilities¹⁶. CEDAW to disaster risk reduction and climate change, as well as the committee affirmed some general principles of the legal instrument such as:

“(...) equality and non-discrimination; participation and empowerment; access to justice (...) step forward in considering environmental issues such as inequality issues under CEDAW. The Committee as has been noted focuses on disaster management, in particular mitigation and adaptation, but refrains from adopting a more radical and transformative approach (...)”¹⁷.

The United Nations Commission on the Status of Women, at its sixty-sixth session from 14 to 25 March 2022, stated:

“(...) gender equality and the empowerment of all women and girls in the context of climate change, environmental and disaster risk reduction policies and programmes (...)”.

In its conclusions of 29 March 2022, the Commission stated:

“(...) the disproportionate impact of climate change, environmental degradation and disasters on women, who are more exposed to risks and loss of livelihoods, also highlighting the importance of recognizing the role of women as agents of change (agency) (...)”¹⁸.

¹⁶EDAW Committee, General Recommendation n. 37 (GR 37) op. cit., par. 75.

¹⁷EDAW Committee, General Recommendation n. 37 (GR 37) op. cit., par. 76ss.

¹⁸United Nations Commission on the Status of Women, Achieving gender equality and the empowerment of all women and girls in the context of

These phenomena create conditions for the migration of women and which constitute:

“(...) drivers and factors that compel women and girls to leave their countries of origin (...) loss of their home, scarcity of water and/or interruption of its provision, destruction and damage to schools and health facilities (...) in the displacement caused by climate change and environmental degradation that women are facing “specific challenges”, including increased risks of violence; reduced access to work, education, essential health services, including reproductive health services and psychosocial support (...) emphasized the importance of recognizing the positive contribution of migrant women in promoting a gender perspective in migratory policies and in programs aimed at responding to the situations of vulnerability experienced by them and in responding to all forms of violence that can occur as a result of displacement (...) in the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change and the Platform on displacement caused by disasters (...)”¹⁹.

In July 2022, the Special Rapporteur on violence against women, in her causes and consequences published a report on violence against women in the context of the climate crisis where she included environmental degradation and the related disaster risk

climate change, environmental and disaster risk reduction policies and programmes, Agreed conclusions, sixty-sixth session, E/CN.6/2022/ L.7, par. 22.

¹⁹United Nations Commission on the Status of Women, Achieving gender equality and the empowerment of all women and girls in the context of climate change, environmental and disaster risk reduction policies and programmes, op. cit.

response²⁰. The report just cited repeated and respected the CEDAW Recommendation:

“(...) limited itself to extending the same observations made with regard to climate change to forms of environmental degradation²¹, the correlation between climate change and other forms of “slow” violence (...) the combined impacts of sudden-onset natural disasters and slow-onset events, environmental degradation and forced displacement seriously affect women's and girls' rights to life, access to food and nutrition, safe drinking water and sanitation, education and training, adequate housing, land, decent work and labor protection (...)”²².

Climate change exposes those affected by it, especially women, to human rights violations that constitute forms of violence and constitute persecution for the purposes of refugee status as well as vulnerable women, as a result of intersectional elements of discrimination, including those who defend, conserve and denounce the condition of resources and ecosystems: the defenders of human rights (women's rights and environmental rights).

The migratory phenomenon and its internal displacement as well

20General Assembly of the NU, Special Rapporteur on violence against women and girls, Reem Alsalem, A/77/136, op. cit.

21EDAW Committee, General Recommendation n. 37 (GR 37), op. cit., par. 13.

22General Assembly of the UN, Special Rapporteur on violence against women and girls, Reem Alsalem, A/77/136, op. cit., par. 7.

as the chances of suffering violence multiply when women are displaced or find themselves in emergency shelters; when they migrate to towns, cities and peri-urban areas as a consequence of forced displacement or planned relocation, encountering difficulties in accessing adequate housing, work and social protection mechanisms. Women are also at risk of trafficking for the purpose of sexual exploitation or domestic work following disasters. This occurred, for example, in the Philippines after typhoon Haiyan in 2013. Climate change can cause outward migration by the male component of society, leaving women having to provide for the survival of the family and having to enter a job market which can be characterized by a gender pay gap and the economic disempowerment. To avoid forced migration or human trafficking, therefore to escape to violence, girls are forced into early marriages, which are themselves forms of gender violence but are felt by families bent by insecurity and economic instability as forms of protection. Climate change and environmental degradation lead to the forced displacement of women, who are thus forced to face high risks of violence,

especially sexual violence²³.

Within this context we remember in 2020 the Special Rapporteur on the Human Rights of Internally Displaced Persons (SRIDP) stating that:

“(...) “particular challenges” that displaced people must face “in the context of the slow-onset adverse effects of change climate²⁴ (...) referring to a report of the Task Force on Displaced Persons, in the framework of the United Nations Framework Convention on Climate Change (...) recalled four ways in which the slow-onset adverse effects of climate change can turn into disaster and increase risks of displacement (...)”.

Climate change gradually reduces the availability of vital resources, such as water and food (for example through the drying up of the soil), leading to food insecurity phenomena that cause displacement and migration. A slow-moving phenomenon onset can turn into a disaster due to a sudden-onset event, such as a flood or a fire. Slow-onset events weaken the ability of communities to face future risks, increasing their vulnerability. Slow-onset events constitute an aggravating factor that multiplies economic, social, cultural and political crisis factors. The

²³General Assembly of the UN, Special Rapporteur on violence against women and girls, Reem Alsalem, A/77/136, op. cit., par. 8ss.

²⁴General Assembly of the UU, Report of the Special Rapporteur on the human rights of internally displaced persons, Cecilia Jimenez-Damary, A/75/207, 21 July 2020, par. 2.

movement, understood in the relationship evidently in another area of the country of origin, is not necessarily an element that increases the vulnerability of the people who are affected by it, but it is also seen as an adaptation strategy, which can take the form, for example, of seasonal or temporary migration. It has perfectly captured the complexity of what we define here as slow violence, as it includes its “human” nature, and the fact that it occurs both in times of peace and in times of conflict²⁵.

Legal ecofeminism

Speaking of ecofeminism and migration we refer ex novo to the Refugee Convention of 1951. An approach that uses and identifies the refugee status which is identified: a) an individual and a particular group such as women who belong to a community affected by change climate; b) the individual specifies the risk of belonging to this group which does not grasp the challenge that has to do with disasters (sudden onset events)

²⁵General Assembly of the UU, Report of the Special Rapporteur on the human rights of internally displaced persons, Cecilia Jimenez-Damary, A/75/207, op. cit., par. 3ss.

but rather with slow violence phenomena such as climate change, pollution from specific substances and the depletion of resources, etc. Within this context the Human Rights Committee of the UN contributes to an innovative look at an international method that is used as legal eco-feminism.

Ecofeminism means the denial of the patriarchal structure of international law which characterizes the marginalization of women in the international legal system. According to Chinkin and Charlesworth in “The boundaries of international law”:

“(...) the exclusion of women is an integral part of the structure of the international legal order, a critical element of its stability and the silences of the discipline are “so important as much as its positive norms and rhetorical structures (...)” (Charlesworth, Chinkin, 2022).

Dianne Otto also stated that:

“(...) a queer and feminist analysis underlined the limits of human rights, which did not call into question the conception of sex/gender as dualist (m/f) (Otto, 2015; Kapur, 2018) and the gendered, racist, imperialist, heteronormative, privileged, autonomous, and disability-free assumptions implicit in this “universal” subject-the human being who is fully capable of enjoying his or her human rights and fundamental freedoms (...)” (Jones, Otto, 2020).

The dichotomy between humans and nature is used to determine patterns of oppression and discrimination that extend beyond

humans to include non-human animals and natural objects (Gear, 2015). The law, as Earth Jurisprudence has stated that (Ito, Montini, 2018): “(...) in a specific human/nature dichotomy, where the former dominate the latter” (Plumwood, 1993). Ecological disasters and pandemics are the tip of the iceberg of a long process of destruction. It is the product of decades of environmental exploitation and domination of human beings, the “privileged”, over the natural environment. The concepts we use in international law inevitably incorporate “traces of power and domination” and this recognition allows us to reflect on possible changes characterized by the absence of domination (Singh, D'Aspremont, 2019).

The United Nations Special Rapporteur on human rights and the environment, David Boyd, also stated that:

“(...) today's dominant culture and the legal system that supports it are destructive in themselves. We need a new approach that finds its roots in ecology and ethics (...) we are part of nature: not independent, but interdependent (...)” (Montini, 2011; Boyd, 2017).

Thus it is understood that ecofeminism has in its nature a crucial role in denying the patterns of oppression between humans and humans towards nature that exist in its currents of thought

(Warren, 1990; Mies, Shiva, 1993; Mellor, 1997; Malory, 2009; Vakoch, Mickey, 2018).

According to Plumwood:

“(...) ecofeminists differ on how and even whether women are connected to nature, whether this connection is shareable with men, how to deal with women's exclusion from culture, and how to reevaluate the connection with nature” (Plumwood, 1993).

The description of ecofeminism goes beyond the scope of this contribution, but it is appropriate to highlight how this approach (method, as we argue in this contribution) has been underestimated by internationalist jurist. The accusation of essentialism leveled against ecofeminists in the 1990s. An accusation which is well founded in some respects, but which in others trivializes the richness of a thought that has not simply equated women with nature (Gaard, 2011)²⁶. It should also be recognized that neither ecofeminism nor the environmental humanism have never taken legal discipline into serious

²⁶“(...) current critical developments in allegedly new fields such as animal studies and naturalized epistemology are now “discovering” theoretical perspectives on interspecies relations and standpoint theory that were developed by feminists and ecofeminists decades ago, yet unlike those ecofeminists who theorize about speciesism (a branch variously called “vegetarian ecofeminism” or “animal ecofeminism”), few of these animal studies scholars address interspecies or gender justice (...)”.

consideration (Warren, 1997; Oppermann, Iovino, 2017). It has great potential for application as a legal method of international law, because it calls into question monolithic legal categories, such as refugee status, and reconsiders them in light of the interdependence between all species (human and non-human) and with nature, giving priority to the needs of marginalized communities that are most affected by climate change (Oppermann, Iovino, 2017).

Karen Morrow stated that:

“(...) when ecofeminism is pursued in an international context, its goal is to import this paradigm shifting approach to accommodating alternative/additional procedural and substantive expertise and experience, from the periphery to the mainstream (...). It plays certainly some considerations on climate change law and how key principles of ecofeminism, including the identification of multiple forms of oppression, can contribute to the definition of policies for adaptation and mitigation, but it focuses almost exclusively on a participatory and inclusive decision-making by women to build consensus around environmental issues (...)” (Morrow, 2016).

According to Wilkinson Cross:

“(...) the concept of intergenerational equity as encompassing the human and the non-human offered a critical look at the dominant discourse on environmental matters (markedly anthropocentric) of modernization and sustainable development (...)” (Wilkinson Cross, 2023).

All these contributions just reported present a system of evolution in the jurisprudence of the Human Rights Committee of the UN. A jurisprudence capable of putting the experience of women who face phenomena of slow violence and climate change in an ecofeminist key, thus building the thesis of a par ricochet protection that is sensitive to gender and ecologically sustainable.

The Ioane Teitiota case and the dissenting opinion of Sancin

Among the emblematic cases of climate change adaptation and mitigation measures²⁷ is the Teitiota case by the Human Rights Committee in October 2019 (Hamzah Sendut, 2020; Reeh, 2020). The many communications of various types and above all from bodies of the UN for the protection of human rights where the main argument is the violation of fundamental human rights as a consequence of the failure of the state to adopt measures that contain effects of climate change. Less widespread are the

²⁷See the decision of the Dutch Supreme Court, Urgenda Foundation v. Netherlands, judgment of 20 December 2019, HAZA C/09/00456689. Climate Change Litigation Databases della Columbia University <http://climatecasechart.com/>

appeals that explore and address slow violence by including climate change as a driver of migration and as a form of persecution against women (Hodson, Laverns, 2019) which takes into consideration the hypotheses of slow violence and the use of the ecofeminist method.

Ioane Teitiota, resident on the central Pacific island of Tarawa in Kiribati, appealed for asylum status in New Zealand arguing that:

“(...) the situation in his country of origin had become increasingly unstable and precarious as consequence of the rise in sea levels caused by climate change”.

The intrusions of sea water dramatically reduced access to drinking water and water for agriculture. The impact of climate change was felt also on a social level, with disputes over portions of land on the island, subject to a process of erosion. The New Zealand Immigration and Protection Court had adopted a negative decision against the applicant, although it had not completely ruled out the possibility that environmental degradation could “create pathways into the Refugee Convention or protected person jurisdiction” (Reeh, 2020).

In the second level the appeal was rejected by the Court of Appeal and the Supreme Court and as a consequence we had the

repatriation in 2015 of both the man and his wife and children who were born in New Zealand. A man who emigrated with his wife and was living from fishing and agriculture. The woman had emigrated to the island of Kiribati in Tarawa where she married the applicant. Teitiota described a: “(...) reduction of housing capacity, saline contamination of drinking water, land erosion and childhood diseases”²⁸. A displacement was not imaginable within Tarawa considering the general situation of the island, but neither was the transfer to the woman's country of origin, who faced comparable climate risks. The man underlined how, since returning to Tarawa, the family, in particular the children, had suffered “reasonably bad health problems”. He invoked the violation by New Zealand, through a decision of expulsion to the country of origin, of article 6(1) of the International Covenant on civil and political rights (right to life) before the United Nations Human Rights Committee. The New Zealand government invoked the inadmissibility of the appeal, arguing that there was no evidence of “actual or imminent harm” towards the author and the real risk for Teitiota of being the victim of serious physical

²⁸United Nations Human Rights Committee, Teitiota, op. cit., para. 2.6.

harm as a consequence of widespread violence on the island caused by housing, land or property disputes.

The point was not so much the one raised by the government, but rather that of verifying whether the applicant had demonstrated a real risk of irreparable damage to his right to life in the event of deportation. The applicant had sufficiently demonstrated that, due to the climate change, he would have faced a real risk of violation of his right to life in the event of deportation to his country of origin, New Zealand. With the decision to expel him to Kiribati, had put his life in danger, in violation of Article 6 of the International Covenant on Civil and Political Rights, and had not adequately verified the risk that such deportation would have entailed. It recalled the General Comment no. 31 (2004), according to which states have the obligation not to extradite, deport, expel or otherwise remove a person from their territory where there are “substantial grounds for believing” that there is a real risk of irreparable harm in violation of Articles 6 and 7 of the International Covenant on Civil and Political Rights. The risk must be personal and cannot be derived from general conditions existing in the receiving state, except in the most extreme cases.

It is up to the bodies of the state parties to examine the facts and the necessary evidence in order to determine the existence of such a risk. Linked to another general comment, n. 36 (2019)²⁹ has observed that the right to life cannot be understood in a restrictive sense and that the obligation for states parties to ensure this right extends to “reasonably foreseeable threats and life-threatening situations that can result in loss of life³⁰ environmental degradation, climate change and unsustainable development constitute urgent issues and serious threats to the ability of present and future generations to enjoy the right to life³¹.

Continuing, the Committee stated that:

“(...) a) there was no generalized risk of violence in Kiribati such as to create a real risk of irreparable damage to Teitiota; b) the applicant had not demonstrated evident arbitrariness or error in the verification carried out by the national authorities on the existence of a real, personal or reasonably foreseeable risk to his right to life as a result of the climate of violence existing on the island; c) the author of the appeal had not provided sufficient information on the inaccessibility, insufficiency or insecurity of drinking water such as to entail a reasonable threat to health and

29United Nations Human Rights Committee, General comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019.

30United Nations Human Rights Committee, Teitiota, op. cit., par. 9.4.

31United Nations Human Rights Committee, Teitiota, op. cit.

therefore a violation of one's right to life or premature death; d) the appellant had not demonstrated that the local authorities' assessment of the state of the crops - difficult but not impossible - was arbitrary, incorrect or likely to cause a denial of justice (...) there had been no violation of the appellant's right to life (...) recognized that both slow-onset processes, which produce a gradual deterioration of resources, and sudden-onset events, such as storms and floods, can propel cross-border movement of individuals seeking protection from climate change-related harm (...) concluded that without national and international efforts the effects of climate change in some countries may expose individuals to a violation of their rights guaranteed by Articles 6 and 7 of the Covenant (...) Kiribati was taking adaptation measures to reduce the risk of existing vulnerabilities and therefore the deportation decision of the New Zealand authorities, which had taken multiple elements into consideration, should not be considered arbitrary (...)”³².

Within this context of analysis with many opinions on the matter and certainly based on front-line international conventions that are very important for the development of ecofeminist justice, we also have the dissenting opinion of judge Sancin of Slovenian origin who stated:

“(...) there is a difference between drinking water and safe drinking water, the former being able to contain microorganisms that are harmful to health, particularly for minors. Example of slow violence, the presence of microorganisms harmful to health, from a precautionary perspective, should be taken into consideration in decisions that look at the situation of the applicant's country of origin (...). He did not agree with the opinion of the majority that the deportation of the appellant to

³²United Nations Human Rights Committee, Teitiota, op. cit.

Kiribati would not cause an imminent or probable risk of arbitrary deprivation of the appellant's life (...) it was not up to the appellant, but to the New Zealand State to demonstrate that the perpetrator and his family could in fact enjoy access to healthy water in Kiribati (...) the burden of proof would be excessively onerous if imposed on the person invoking refugee status (...)”³³.

Ecofeminist praxis

For the first time we can say that we deal with ecofeminism in international law, thus contributing to investigating the notion of the expressed imminence of overturning the burden of proof.

Rereading the appellant's points and what was decided we can understand that there are some elements for further investigation. For example, the first element is gender. Climate change as well as the continued deterioration of natural resources is disproportionately affecting women. And we arrive at this conclusion given that in Kiribati, in Tarawa the coral atoll which was a source for family living according to the study of the Asian Development Bank, women, children, elderly people as well as families:

“(...) bear a disproportionate share of the burden of inadequate

³³See also the dissenting opinion of judge Vasilka Sancin.

WASH (water, sanitation and hygiene) infrastructure and behaviors”³⁴.

In the southern part of Tarawa, women are responsible for all domestic tasks related to the use of water, such as washing, cleaning, taking care of children and the elderly. The intermittent supply of water is a problem for many families and especially for women, who need menstrual hygiene: clean water and appropriate materials are often not available in homes, schools, workplaces, resulting in absenteeism and incapacity to manage this biological phenomenon with dignity. Children suffer more from diseases linked to the use of unhealthy water. In Tarawa girls suffer more than boys from diarrhea and dysentery due to gender inequalities structured in a highly patriarchal, which involves different feeding practices between sexes (to the detriment of girls) (Narsey Lal, 2015). In Tarawa, women bear the disproportionate impact of energy shortages, as it perpetuates economic poverty and exacerbates the unequal division of labor within the household. The health impact of alternative energy

34Asian Development Bank, Climate Change, Water Security, and Women, A Study on Water Boiling in South Tarawa, 2021, pp.6-7, <https://www.adb.org/sites/default/files/publication/722186/climate-change-watersecurity-women-kiribati.pdf>.

sources such as firewood and kerosene is also greater for women residing on the atoll, who are generally responsible for preparing meals for the family (Narsey Lal, 2015) .

These are elements that we can also recognize from the EDAW Committee in the relevant positions it obtained during the concluding observations of 2020 when it was stated that:

“(...) in Kiribati there is a patriarchal cultural heritage that manifests itself through customs and practices which are at the root of the highest levels of gender-based violence against women in the Pacific”.

There is a concern about the limited participation of women in the implementation of disaster risk management and climate change programmes; for the impact of seawater flooding of agricultural lands and wells on women's access to food, water and medicinal plants; for the limited participation of women in state's migration policies³⁵.

Another element that needs analysis is the impact of climate change on non-human species and natural objects which has not been examined by the Committee. Sea level rise has a significant effect on ecosystem functions and biodiversity. The World Bank

35CEDAW Committee, Concluding observations on the combined initial, second and third periodic reports of Kiribati, 11 March 2020, CEDAW/C/KIR/CO/1-3.

study states that phenomena such as floods also destroy birds that are forced to leave³⁶. Regarding ocean water, the situation is evaluated considering that non-human animals and natural species such as ocean acidification is an example that is defined as slow violence that damages ecosystems and the decline of fishing capabilities for residents. The environment and humans are involved (Stone, 2010) and play an important role in the imminence and predictability of the risk considering that the ecofeminism method according to the committee specifies that:

“(...) the situation in Kiribati must be monitored and updated before deciding on future deportation cases, therefore it “opens” to even quasi-jurisprudential developments, however it can be assumed that the Teitiota case already contained further elements to be valorised in legal reasoning”.

Only from the “boss” family, raises a procedural question on the role of the appellant, as it does not take into account the impact that phenomena such as climate change and other forms of slow violence have on women and children (Stone, 2010).

Here we need a paradigm shift which is found in the relationship between victim-oriented and which shifts the relative weight of

³⁶World Bank, Climate Risk Country Profile, Kiribati, 2021, p. 13.
https://climateknowledgeportal.worldbank.org/sites/default/files/country-profiles/15816-WB_Kiribati%20Country%20Profile-WEB.pdf

the evidence from the victim to the state which decides on the expulsion. This type of assessment has two compositional characteristics. A state one that deals with the verification of compliance with obligations and due diligence from the state of origin such as destination and rejection and one of an individual nature that is part of the applicant's situation. The weight of the evidence in risk situations resulting from climate change cannot be and/or be part of the victim who actually requests international protection but on the state that rejects and does not respect the destination of the due diligence obligations in the adoption of measures of adaptation to climate change and reduces the risk of irreparable damage to the lives of individuals. This is a par ricochet protection that is gender sensitive and ecological at the same time. Let us remember ex novo that in the Teitiota case the EDAW Committee itself stated that: “(...) there is no imminent risk for the applicant's life, as the violence is not generalized on the atoll (...)”.

An ecofeminist perspective would have read it differently the situation. It would have taken into account the increase in violence as “internal” to families, as a structural element of a

patriarchal society exacerbated by situations of survival and lack of basic necessities. Access to water is clearly compromised, as the quality of water must be measured taking into account the specific situation of some categories of society, the most vulnerable ones, such as children, or those whose vulnerability is determined by specific biological needs, such as the presence of the menstrual cycle³⁷.

The Teitiota case was judged on the absence of evidence of risk of irreparable harm to one's life and not through a scrutiny of state actions as in the case of Kiribati struggles, without international help to respond to the related challenges that are part of the climate change and of forms of slow violence. The assessment of the state that examines the application for international protection of individuals coming from countries such as Kiribati is considered as an individual situation where the relevant elements that are included of an intersectional nature and discrimination are used in its own logic of ecological gender sensitivity.

According to the dissenting opinion of judge Sancin which was

³⁷CEDAW Committee, Concluding observations on the combined initial, second and third periodic reports of Kiribati, op. cit.

based on the obligation of non-refoulement: “(...) positive obligation to protect (...)” and the paradigm shift on the par ricochet model which is sensitive to gender and ecology is useful in responding to migrations induced by climate change and forms of slow violence, thus forgetting the individual dimension and appreciating the situation of the state which is unable and/or does not want to protect its population from the risks deriving from climate change and from forms of slow violence.

If a woman applies for refugee status when she leaves her territory due to climate change or other forms of disasters and/or deterioration of the environment, she is subject to violence as a woman and does not have to demonstrate reconnection in another area of the country of origin which is directly discriminated against. State rejection shows that the country of origin or destination that rejects the relevant application does not comply with due diligence obligations regarding the prevention of and violence against women that is created by climate change or by forms of onset emergencies where the victim is individual and pursues his own complex situation which takes into consideration intersectional elements of a discriminating nature.

Concluding remarks

The connection between gender violence against women, migration and climate change is found in the approach to ecofeminism as a method of analysis. The notion of climate violence is defined as a natural phenomenon of social construction that repeats patterns of discrimination, even of an intersectional nature, against women. The decisions of the UN Human Rights Committee in the Teitiota case oriented towards an ecofeminist perspective are related to gender-based and ecological protection *par ricochet* which take into account disproportionate effects not only of climate change but also of forms of slow violence such as various forms of pollution towards women and beyond. The decisions adopted by international bodies are thus capable of: “(...) expand the judicial lens and unsettling the determinacy of law (...)” (Charlesworth, 2019).

At the same time, according to judge Sancin's position in the Teitiota case, the prohibition of non-refoulement applies when the government of the state of origin is not able to apply a policy

of protection of its citizens from the effects of climate change even in cases where the government of the state of origin discriminates against citizens or groups in its response policies that have to do with the effects of climate change. Par ricochet protection is based on responses from a non-essential approach where on the one hand it takes into consideration the situation of the individual which includes forms of discrimination against them. On the other hand, the individual who demonstrates the gravity of the situation existing in the country who intends to flee the state and who demonstrates his adoption of necessary measures for prevention, mitigation or adaptation of the effects of climate change and forms of slow violence despite the emergence of disaster meanings at a global level (Focarelli, 2013)³⁸. Overall, international protection responds to considering women in their diversity of identities as a heterogeneous group of experiences that shape adaptation to climate change (Campbell, 2023).

³⁸“(…) on how great a catastrophe has to be in order to be considered a disaster for legal purposes, nor is there any agreement on what criteria should be used to measure its scale (…)”.

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